ways, 3d edition, 143, 146; 1 Greenleaf on Evidence 305; and see the authorities cited in the first division of the principal case), must, it would seem, have been condemned on this ground alone, even if, as a matter of fact, the testimony had been sufficient to establish its prevalence.

H. N. S.

Supreme Court of Maine.

CYNTHIA S. LEATHERS, ADM'X., *v.* JAMES GREENACRE.

At common law, a will of personal property, written in the testator's own hand, without seal, though no witnesses were present at its publication, is good; and no particular form of expression is material, if only the testator's intention is manifest.

By R. S. c. 74, § 18, "a soldier in actual service, or a mariner at sea, may dispose of his personal estate and wages," as he might have done under the common law.

The terms "in actual service," and "engaged in an expedition," are synonymous.

The term "expedition" is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle.

If, during the late rebellion,—and after he had been mustered into the military service of the United States, but while he remained in barracks, or while thus quartered at any military station in one of the loyal states not exposed to the incursions of the enemy, and before he had crossed over to the seat of war with his regiment to take part in the hostilities existing there, and before he had begun to move under military orders against the foe,—a soldier had made a will without observing the usual statute formalities, it would not be deemed the will of a "soldier in actual service," and therefore not entitled to probate as such.

But having marched into the enemy's country from which he never returned, and encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters and not, at the time of making his will, occupied with any present movement of the troops, but was on some service detached from his own regiment, he would be deemed a "soldier in actual service," and his will be sustained if good at common law.

In August 1862, J. B. L. enlisted in the 1st regiment of Maine cavalry, and was thereafterwards, in the same month, mustered into the U. S. military service. March 6th 1863, while lying in camp at Stafford C. H., Va., he wrote a long letter to the defendant (with whom he had previously deposited the two notes mentioned in his letter), in which he said:—"As life is uncertain, I will give you my wishes in regard to my property, if I should fall here." "The face of the note that" G. H. L. "owes me and now in your hands, and also the note against" C. S., "and interest, I want you to distribute among my brothers and sisters as you think proper, and all other property to my wife (naming her), and for her to pay my debts," (signed.) March 2d 1864, he started on a raid to Richmond in company with others under military orders, was captured and died in prison, March 16th follow-

ing:—*Held*, that J. B. L. was a "soldier in actual service," when he wrote the letter, and that it was a will entitled to probate.

[THE foregoing case will be found reported in full, *ante*, page 533, and we have repeated the syllabus here to add a note which a correspondent has sent us, calling attention to a decision of the Supreme Court of the United States upon a similar point, and suggesting a different reason for the indulgence shown by the law to soldiers' wills. EDS. AM. LAW REG.]

It may be interesting to observe the different construction given to the phrase "in actual service," by the Supreme Court of Maine in the foregoing case, and by the Supreme Court of the United States in *Houston* v. *Moore*, 5 Wheaton 20. The court in Maine were construing that phrase as used in the statutes of that state (R. S. c. 74, § 18), which provide that "soldiers in actual service," may dispose of their personal estate by written will not conforming to the ordinary rules of attestation.

The United States Supreme Court was construing that phrase as used in the 5th amendment to the Constitution of the United States, which allows persons "in the land or naval forces or in the militia when in actual service," to be held to answer for a capital or otherwise infamous crime," without any "presentment or indictment of a grand jury."

The court in Maine decided that the informal military will could not be deemed valid if it were written by the soldier "while he remained in barracks at Augusta, Me., or while thus quartered at any permanent military depot or station in one of the loyal states not exposed to the incursions of the enemy," &c. The United States Supreme Court decided that the militia-man was in actual service as soon as he reached the place of rendezvous and was mustered in, although that place was in Pennsylvania, a state not occupied, invaded, or threatened by the enemy: and declared that such rendezvous "is the *terminus a quo* the service, the pay, and subjection to the articles of war are to commence and continue." (See also, *Martin* v. *Mott*, 12 Wheaton 19).

The reason of the rule as to military wills would seem to be not *nimia imperitia*, the ignorance or unskilfulness of the soldier,—for the soldier may be, or may have been a lawyer or a judge,—nor the near approach of extreme peril, in an actual advance by or upon the enemy,—*cum in expeditione occupatus sit*, as the Supreme Court of Maine expressly affirms, but it is that the soldier is not *suo jure*,—is subject to the despotism of military authority,—cannot leave rendezvous, barrack, or camp, without his commander's permission, any more than he can quit his post when on guard, or his saddle when in actual cavalry charge, and is liable to be tried and punished as a deserter, or as absent without leave, if he presume, without such permission, to go forth in search of counsel, clerk, or witness.

If such be the reason of the law, why should the state court differ from the Federal court in its construction of the words "in actual service"?

J. A. B.